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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No.

JOSEPH B. CRAWFORD, ET AL., *Petitioners*

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The 2,974 Petitioners represented herein respectfully pray that a writ of certiorari issue to review the judgment entered against them by the United States Court of Claims on March 17, 1967.

OPINION BELOW

The Opinion of the Court of Claims is not yet officially reported. It is reported unofficially at 376 F. 2d 266, and is reproduced in Appendix A to this Petition.

JURISDICTION

On March 17, 1967, the Court of Claims issued an opinion and judgment denying Petitioners' motion for summary judgment, granting the motion of the United States for summary judgment, and dismissing Petitioners' actions. Petitioners' timely motion for rehearing was denied by the Court of Claims on July 20, 1967. On October 16, 1967, Chief Justice Warren issued an Order extending the time within which this Petition might be filed to and including November 10, 1967. This Court has jurisdiction to review the judgment herein by writ of certiorari under 28 U.S.C. § 1255(1).

QUESTIONS PRESENTED

1. Under an Act of Congress directing the Secretary of Defense to fix rates of compensation for overseas teachers "in relation to the rates of basic compensation for similar positions in the United States," did the Secretary have any lawful authority to fix such rates *out* of relation to the rates of basic compensation for similar positions in the United States, *solely* on the basis of his determination that the annual amounts appropriated for overseas schools of the Department of Defense were insufficient to pay the teachers' salaries at rates which would conform to the standard specified by Congress, as a result of his other expenditures from those appropriations?

2. What standards should be applied to determine whether Congress, in an appropriation act, has altered a previously enacted substantive statute governing rates of compensation?

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved in this case are set out and cited in Appendix B, *infra,* as follows: the Defense Department Overseas Teachers Pay and Personnel Practices Act, Public Law No. 86-91, 73 Stat. 213 (1959) p. 28a; the Department of Defense Appropriation Acts for the fiscal years 1953-1966, p. 29a; the Department of Defense Directive 1400.13, issued on October 15, 1959, p. 30a; and the Department of Defense Salary Determination Procedures, of August 31, 1960, pp. 30a-34a.

STATEMENT OF THE CASE

This case brings to this Court a controversy which has been raging for almost a score of years concerning the treatment of approximately 20,000 teachers who are or have been employed in schools operated overseas by the Department of Defense ("DoD" hereinafter) for the education of children of United States Government personnel stationed abroad.

Specifically, this case involves claims for compensation under the Defense Department Overseas Teachers Pay and Personnel Practices Act, Public Law No. 86-91 (1959), set out in pertinent part in Appendix B, p. 28a, *infra,* ("the Act" hereinafter). An outline of the background of the Act is a necessary prelude to a discussion of its provisions, on the one hand, and its administration by the Secretary of Defense, on the other.

A. Background

Schools for the children of United States Government personnel stationed abroad were first established by DoD shortly after World War II. Prior to 1959, there was no special legislation concerning those schools, other than the annual DoD appropriation acts

which simply authorized the expenditure of funds "when the Secretary of the Department concerned finds that schools, if any, available in the locality, are unable to provide adequately for the education of such dependents." *E.g.*, 66 Stat. 533, § 616 (1952).

Teachers for those schools were primarily recruited in the United States and were "required to have educational qualifications and credentials on a par with those required in urban school districts in the United States with 100,000 or more population."[1] Their duties and responsibilities were comparable to those of teachers in similar positions in the United States.[2]

Until 1959, however, the terms and conditions of employment of these overseas teachers differed markedly from those applicable in United States school systems. Since there was no special legislation governing their pay and conditions of employment, overseas teachers were subject to the general civil service statutes and regulations. They were, for example, classified for pay purposes as "GS-7" under the Classification Act of 1949, as amended, 5 U.S.C. § 1071 *et seq.* and their leaves were governed by the Annual and Sick Leave Act of 1951, as amended, 5 U.S.C. §§ 2061-2066.[3] These general statutes, as applied to them, resulted in various inequities in relation to domestic teachers in similar positions. For example,

> "* * * they were not paid for the Thanksgiving, Christmas, and Easter recess periods, nor were they

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[1] Defendant's Statement Of Facts In Lieu Of A Response To Plaintiffs' Motion For Call And Request For Admissions, accepted as a stipulation of fact in the Court below ("Statement of Facts" hereinafter), p. 4.

[2] *Id.* at pp. 4-5.

[3] *Id.* at p. 3.

paid for the summer vacation period; they were paid approximately 9/12 to 10/12 of the General Schedule (GS) rates for GS-7's. This caused dissatisfaction on the part of the teachers because teachers in the United States who do not work during similar recess and vacation periods are paid full school year salaries without deductions for such recess and vacation periods." (Statement of Facts, p. 4)

After these problems were brought to the attention of the Congress by a House Committee investigation of the personnel problems in overseas schools conducted in 1955[4] and by presentations at Congressional hearings by the National Education Association and the DoD itself,[5] legislation was proposed to correct these inequities. This proposal, which ultimately became the Act, received universal support, including that of the DoD itself.[6]

In opening the hearings before the House Subcommittee on Civil Service, the Chairman stated:

"The legislation before the subcommittee will provide an improved system of personnel administration and compensation for school teachers and certain school officers and other employees of the dependents schools of the Department of Defense in foreign areas.

"The new system will be comparable to those found in the majority of the public primary and

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[4] See H. Rep. No. 2109, 84th Cong., 2d Sess. (1956).

[5] *Hearings on Department of Defense Appropriations for 1959 before Subcommittee of House Committee on Appropriations,* 85th Cong., 2d Sess., pp. 519, 536-546 (1958).

[6] See *passim, Hearings on H.R. 1871 Before the Subcommittee on Civil Service of the House Committee on Post Office and Civil Service,* 86th Cong., 1st Sess. (1959).

secondary school jurisdictions in the United States, including the District of Columbia * * * .

* * *

"Individuals in overseas teaching positions will be exempted from the Classification Act of 1949 and from certain other civil service and personnel procedures which are not appropriate for their positions. Their compensation will be fixed by the heads of the respective military departments, subject to general regulations of the Secretary of Defense. Rates of pay will be established in relation to the rates for similar positions in the United States, not exceeding the maximum rates for teaching positions with comparable levels of responsibility in the District of Columbia schools." *Hearings on H.R. 1871 before the Subcommittee on Civil Service of the House Committee on Post Office and Civil Service,* 86th Cong., 1st Sess. pp. 5-6 (1959).[7]

The House Committee Report summarized the Congressional purpose of the Act in the following terms:

"The purpose of this legislation is to provide a system of personnel administration for school teachers and certain school officers and other employees of the dependents schools of the Department of Defense in overseas areas, comparable to the type of system found in the majority of the public, primary and secondary school jurisdictions of the United States. The proposed system will eliminate many of the difficulties resulting from the present application to such personnel of certain civil service rules and regulations, the Classifica-

[7] Similar statements were made, during the course of these hearings, by Congressman Broyhill (*id.* at p. 9), Stephen S. Jackson, Deputy Assistant Secretary of Defense for Manpower (*id.* at pp. 11-12), Congressman Foley (*id.* at p. 25), Kent Rossier, President of the Overseas Teachers Association (*id.* at pp. 28-29), Mary Hoague, Legislative Chairman of the Overseas Teachers Association (*id.* at p. 35).

tion Act of 1949, and the Annual and Sick Leave Act of 1951." H. Rep. No. 357, 86th Cong., 1st Sess., p. 1 (1959).

The intention of the Act was thus plainly to eliminate the disparities in the compensation and other treatment of overseas teachers in relation to teachers in the United States.

B. The Act

The provisions of the Act carried out the Congressional intention. In most pertinent part, the Act provided the following substantive standard critical to this case:

> "The Secretary of each military department shall fix the rates of basic compensation of teachers and teaching positions in his military department in relation to the rates of basic compensation for similar positions in the United States * * * ."

In addition, the Act provided that:

> "* * * the Secretary of Defense shall prescribe and issue regulations to carry out the purposes of this Act. Such regulations shall govern—
>
> * * *
>
> "(2) the fixing of the rates of basic compensation for teaching positions in relation to the rates of basic compensation for similar positions in the United States; * * *."[8]

There was nothing equivocal or qualified on the face of the Act with respect to the Government's obligation to pay rates of basic compensation in relation to those for similar positions in the United States. The Act

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[8] Sections 5(c) and 4(a)(2) of the Act, set out in Appendix B, p. 28a, *infra*.

contained no suggestion of any limitation based upon the amounts which Congress might annually appropriate or the DoD might annually desire to expend on overseas teachers' salaries.

C. The DoD Administration of the Act

Notwithstanding the clear substantive standard established by Congress in the Act, the DoD elected not to pay the overseas teachers rates fixed in relation to the rates for similar positions in the United States. Rather, the DoD fixed rates in relation to a figure which appeared in the annual DoD appropriation acts concerning the average cost per pupil in the overseas schools.

1. The Per Pupil Limitation

The figure which appeared in the DoD appropriation acts has been referred to as the "per pupil limitation." It found its origin in the DoD appropriation act for the fiscal year 1953 in the following language:

> "Appropriations for the Air Force and the Army for the current fiscal year shall be available for expenses in connection with * * * primary and secondary schooling for dependents of military and civilian personnel of the Department of Defense residing on military installations or stationed in foreign countries in amounts not exceeding an average of $225 per student, when the Secretary of the Department concerned finds that schools, if any, available in the locality, are unable to provide adequately for the education of such dependents." 66 Stat. 533, § 616 (1952).

While the amount of the limitation has varied from $225 for fiscal 1953 to $455 for fiscal 1966, the language

of the "per pupil limitation" has been substantially identical since 1953.

In practice, the per pupil limitation did not extend to all costs.[9] The appropriation acts themselves did not specify which items of cost were chargeable against the limitation. Nor did they specify how much of the amount appropriated could or should be allocated by DoD to any particular item of expense. Indeed, there was even disagreement among the military services as to precisely which costs were chargeable to the limitation.[10] Teachers' salaries, however, were always charged by DoD against the limitation.

Prior to the passage of the Act, when overseas teachers were paid in accordance with the Classification Act of 1949, their salaries were never reduced or adjusted in order to meet the exigencies of the per pupil limitation. DoD never asserted it had any discretion to pay teachers on any basis other than the substantive compensation standard directed by the Congress.[11] DoD found solutions through means or economies other than reducing or adjusting the salaries of overseas

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[9] See opinion of Court of Claims in this case, at p. 4a, *infra;* Department of Defense Instruction 1342.5, "Elements of Cost for Education of Dependents Overseas, and Computation of Costs Chargeable to Per Pupil Limitation," April 10, 1964, superseding DoD Instruction 1342.5, "Charges to the Per Pupil Limitation for Education of Dependents Overseas," October 28, 1957, Exhibit B-1, Defendant's Opposition To Plaintiffs' Motion For Summary Judgment in the Court below. "Funds made available on the basis of the per pupil limitation represent only a portion of the total cost of the program." H. Rep. No. 1329, 88th Cong., 2nd Sess., p. 27 (1964).

[10] H. Rep. No. 439, 88th Cong., 1st Sess., pp. 28-29 (1963).

[11] Supplement to Defendant's Statement of Facts, filed December 6, 1965.

teachers, whenever practical budgetary problems developed because of the per pupil limitation.

2. The DoD Regulations Under the Act

In the original DoD Regulations promulgated in October 1959, a few months after the Act became law, the per pupil limitation was not mentioned. The express direction of Congress that the teachers shall be paid in relation to similar salaries in the United States was recognized in the following language:

> "Rates of basic compensation for teaching positions will be fixed by the Secretaries of the military departments in relation to rates of basic compensation for similar positions in the continental United States, exclusive of Alaska and Hawaii * * *." [12]

In January 1960, DoD issued an initial salary schedule which purported to be based on the average of salaries in 33 selected urban school districts in the United States and thus to be in accord with the foregoing Regulations and the Act. In fact, however, this schedule was "adjusted in consideration of the need to stay within the established per pupil limitation, contained in the Defense Appropriation Act * * *." [13]

Thereafter, pursuant to the direction of Congress,[14] the DoD held a series of conferences with representa-

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[12] DoD Directive 1400.13, as issued October 15, 1959, Exhibit F, Defendant's Opposition To Plaintiffs' Motion For Summary Judgment.

[13] Affidavit of Edward A. Sompayrac, Exhibit C, Defendant's Opposition To Plaintiffs' Motion For Summary Judgment, p. 5.

[14] "It is the committee's understanding and expectation that, in the drafting of these regulations, the appropriate officials of the department will consult the representatives of the Overseas Teachers Association and give full consideration to the advice of these people to obtain the benefit of their practical, on-the-spot knowledge of many of the operating problems in the oversea schools." H. Rep. No. 357, 86th Cong., 1st Sess., p. 4 (1959).

tives of the Overseas Education Association for the purpose of developing the standards for the establishment of teachers' salaries in the future; and the DoD then promulgated Salary Determination Procedures which provided for an annual review of the salary schedule, in accordance with the Government's customary practice "when wage schedules are administratively determined and related to prevailing rates * * * ." It also provided a specific formula for translating the "in relation to" standard into precise dollar salary figures.[15]

To this extent, again, the Regulation was in harmony with the Act. But, again, the DoD Regulation did not leave overseas teachers' salaries fixed in conformity with the Act, but established them as the DoD safety valve in the event budgetary difficulties should develop, by providing that the salaries determined pursuant to

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[15] This formula provided:

"(a) Comparison for the purpose of establishing and adjusting the compensation schedule will be made with rates of compensation in urban school jurisdictions of 100,000 population and over. Data from as large a proportion of these school jurisdictions as possible will be utilized.

"(b) The beginning salary step (step (a)) of the compensation schedule will be related to the average (mean) of the entrance rates paid teachers holding a bachelor's degree, by establishing step (a) at this mean amount, rounded to the nearest five dollars.

"(c) The size of the step rate increases will be related to the average (mean) of step rate increases in effect by fixing the step rate increase at the mean amount paid teachers holding a bachelor's degree, rounded to the nearest five dollars."

Teacher salary data compiled by the National Education Association, showing the rates referred to, are available annually and are "factual and authoritative". Statement of Facts, pp. 6-7, and Exhibit C thereto.

the "in relation to" substantive standard would be adjusted on the basis of the per pupil limitation:

> *"When the per pupil limitation is known, final determination as to an appropriate adjustment will be made. Adjustments in the compensation schedule will be made coincident with the beginning of a school year."* [16] (Emphasis in original.)

Because the DoD proceeded to establish overseas teachers' salaries in accordance with DoD appropriations rather than in relation to salaries for similar teaching positions in the United States, the salaries of the overseas teachers fell further and further behind those of teachers in similar positions in the United States. The Table set out in Appendix C, p. 35a, *infra,* demonstrates the manner in which this gap widened.

As this Table demonstrates, the beginning salary for overseas teachers ran behind by $229 for the 1960-61 School Year and by the following respective increasing amounts for each successive School Year: $389; $484; $528; and $685. Moreover, the annual salary increments of the overseas teachers were inferior in relation to similar teachers in the United States in both amount ($185 as contrasted with higher amounts rang-

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[16] In a comment immediately following this statement, DoD elucidated as follows:

> "COMMENT 1: It is planned that if the per pupil limitation is increased sufficiently to effect adjustments as provided above, such adjustments will be ordered into effect. There may be times, however, where the per pupil limitation will permit only part of the adjustment being made effective. *Final determination of the adjustment, therefore, should await decision on the per pupil limitation."* (Emphasis added.)

ing up to $255) and number (10 as contrasted with 12 or 13).[17]

During this same period, Congress enacted a number of pay raise statutes for Government employees covered by the Classification Act; and as a result, the salaries of overseas teachers fell behind those of Government employees generally by a progressively increasing margin. They likewise fell far behind the salaries of their fellow employees in the overseas schools, such as principals and secretarial and clerical employees, whose salaries were governed by the Classification Act and which DoD did not attempt to "adjust" on the ground of budgetary limitations. Indeed, as a consequence of the DoD administration of the Act, overseas teachers were paid less than what they would have been paid if the Act had never been passed[18]—an anomalous and ironic result under a statute which Congress passed precisely to remedy inequitable salary practices.

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[17] It is interesting to note that in School Year 1959-1960, the salaries of overseas teachers were approximately in relation to those in the United States School Districts with 100,000 or more population. The starting rate for overseas teachers was $4,050 (see Exhibit A, Part 1, p. 1 to Statement of Facts). The equivalent United States salary was $4,070. See p. 35a, *infra*.

[18] The following table shows the successive increases in the GS-7 starting rate provided by amendments to the Classification Act after the 1959 Act was passed:

Salary Increase Statute	Effective Date	GS-7 Starting Rate
P.L. 86-568, § 112(b), 74 Stat. 298	Jul. 1960	$5,355.
P.L. 87-793, § 602(b), 76 Stat. 843	Oct. 1962	$5,540.
P.L. 87-793, § 602(b), 76 Stat. 843	Jan. 1964	$5,795.
P.L. 88-426, § 102(b), 78 Stat. 400	Jul. 1964	$6,050.
P.L. 89-301, § 2(b), 79 Stat. 1111	Oct. 1965	$6,269.
P.L. 89-504, § 102(b), 80 Stat. 288	Jul. 1966	$6,451.

D. The 1966 Legislation

By 1966, the situation caused by the DoD administration of the Act had become intolerable. As the House Committee on Post Office and Civil Service noted:

> "The Committee on Post Office and Civil Service is deeply concerned at the treatment that has been accorded the overseas school teachers—a concern shared, it is believed, by many other Members of Congress—particularly in view of *the obvious failure to administer the salary provisions of Public Law 86-91 as they were intended and expected by the committee and the Congress to be administered. Without attempting to place the blame, and whether it be due to administrative unwillingness to shoulder the burden of obtaining necessary funds or disagreement with the policies of Public Law 86-91,* it certainly is essential that the problem be resolved without further delay." H. Rep. No. 519, 89th Cong., 1st Sess., pp. 3-4 (1965) (emphasis added).

Accordingly, the Committee reported H.R. 6845, which ultimately became Public Law 89-391. The purpose of this new Act was to

> "establish a positive, reasonable, and fully effective legislative policy with respect to rates of compensation which shall be paid to teachers in the overseas dependents school system of the Department of Defense, under which policy the Department of Defense and the three military departments shall and must pay such teachers salary rates equal to the average range of salaries paid teachers having comparable levels of duties and responsibilities in urban school jurisdictions in the United States of 100,000 or more population. This policy, and the mandatory payment of such equal salary rates, is *consistent with, and will strengthen, the policy*

laid down by the Congress in the enactment of the Defense Department Overseas Teachers Pay and Personnel Practices Act (Public Law 86-91), which thus far has not been effectuated in accordance with congressional intent." *Id.* at p. 2 (emphasis added).

This Report continued:

"The Post Office and Civil Service Committee and the Congress understood that in enacting Public Law 86-91 they were providing a firm and reasonable formula for the payment of appropriate salaries to overseas teachers. That understanding has not proved out. H.R. 6845 provides a standard which, although variable in amount, is positive because the precise dollar amounts in question are readily ascertainable. In fact, the currently applicable dollar amounts are already of record. The bill then goes on to direct and require that the overseas teachers *shall* be paid salaries determined by the standard. There is no room for the substitution of independent views or judgments by any Federal, civilian or military official. The average of the range of rates of salaries paid teachers having positions of comparable levels of responsibility in urban school jurisdictions of 100,000 or more population within the United States will have to be computed, and all of the figures are matters of public record, each year, and the results of the computations will be applied directly to overseas teachers' salaries." *Id.* at p. 4 (emphasis in original).

Public Law 89-391 was therefore enacted to amend Section 5(c) of the Act so as to provide that:

"The Secretary of each military department shall fix the basic compensation for teachers and teaching positions in his military department at rates equal to the average of the range of rates of basic compensation for similar positions of a comparable level of duties and responsibilities in urban school

jurisdictions in the United States of 100,000 or more population." 80 Stat. 117, 5 U.S.C. § 2353(e).

In the 1966 legislation Congress clearly intended only to accomplish the objective of the 1959 Act—which it felt had been undermined by DoD—and to insure that that which it had provided in the 1959 Act would henceforth be carried out without compromise or deviation. All the 1966 legislation did was to write into statutory law the DoD formula for computing salaries pursuant to the "in relation to" substantive standard prescribed in the 1959 Act—but without any adjustment for the per pupil limitation.

E. Proceedings Below

This case involves 2,974 individual plaintiffs who brought six separate actions in the Court of Claims under 28 U.S.C. § 1491, to recover the difference between the compensation they were entitled to under the Act and the compensation they had in fact received.[19]

The Court of Claims, Judges Nichols and Durfee dissenting, granted summary judgment to the Government. Much of the majority opinion dealt with a contention, urged at one time by plaintiffs, that they were entitled to be paid the same rates as teachers in the District of Columbia. This contention was withdrawn in the Petition for Rehearing and therefore need not be dealt with here.

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[19] Seven petitions on behalf of 2,975 plaintiffs, with identical claims, were filed in the Court of Claims. The actions were consolidated and decided together on cross-motions for summary judgment.

Two of the plaintiffs died after their cases were filed and their legal representatives were substituted in their place and stead. One of the plaintiffs did not join in the petition for rehearing in that Court and is not encompased by this Petition.

As to the major issue in the case—whether the Secretary was entitled to reduce salaries which would otherwise be payable solely on the basis of his own judgment as to what portion of the annual DoD overseas schools appropriations should be used for teachers' salaries—the Court majority assumed that the Act gave discretion to the Secretary and that such discretion was sufficiently broad to permit such action (App. A, p. 13a). The majority held in effect that the "in relation to" substantive standard served no function whatever, inasmuch as the Act constituted no more than an authorization by Congress to DoD to establish salaries at whatever level Congress might authorize in the annual appropriations acts. It also relied upon *Mitchell* v. *McNamara,* 122 U.S. App. D.C. 224, 352 F. 2d 700 (1965) (App. A, p. 14a), without noting that *Mitchell* involved a dismissal for lack of jurisdiction and did not involve any decision on the merits. In its reliance upon the statements of the proponents of the Act that it was not a "pay raise measure" and their estimates that its initial cost would be a modest $270,000 (App. A. p. 15a), the majority overlooked the fact that overseas teachers' salaries at that time stood in relation to salaries for similar positions in the United States;[20] and it was this relationship which Congress directed DoD to maintain.

As additional muster, the majority suggested that the teachers had acquiesced in the Regulations issued by DoD (App. A, p. 17a). To make this point, the majority ignored the Government's stipulation that the teachers "complained to defendant that such rates [which they were being paid] were less than the rates they were entitled to under said Act; such complaints were numerous and were made and continued from approxi-

[20] See footnote 17, *supra.*

mately the end of school Year 1959-1960 until the filing of the Petition herein.[21] Further, the majority availed itself of the doctrine that the contemporaneous interpretation of a statute by the agency charged with its administration is entitled to great weight. (App. A, p. 17a). And, finally, the Court reasoned that since the Congress had been constantly aware of DoD's interpretation and administration of the statute, Congress must have agreed with it (App. A, pp. 17a-18a).

The majority declined to accept the 1966 amendment as an indication of the purpose of the Act, because it post-dated the Act (App. A, p. 19a); but tendered no explanation of how it could accept appropriation acts—which also post-dated the Act—as a guide to the intention of Congress expressed in the substantive standard embodied in the Act (App. A, p. 18a).

The dissenting opinion argued that if DoD had any discretion under the Act, it did not include discretion to adjust salaries in order to meet the exigencies of the per pupil limitation. Having developed a formula for determining teacher salaries "in relation to" those paid in the United States, the dissent argued, DoD was obliged to apply that formula. The statements made by the proponents of the legislation that it would not raise wages, said the dissent, "were apparently true for the immediate future, and for the years that were then more remote, of course no one could have said what would occur." App. A, p. 23a.

The dissent reasoned that the per pupil limitation adopted annually by Congress could not be construed as amending the basic statute or as approving the

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[21] Statement of Facts, par. 14, pp. 7-8.

salary structure promulgated by DoD; that Congress might have believed that the full statutory salary could be paid without increasing the per pupil limitation if other economies were introduced in the operation of the schools; and that Congress never expressly indicated agreement with DoD's interpretation and, indeed, strongly criticized it when it considered and adopted the 1966 legislation.

As for the argument based upon the weight to be given to the contemporaneous administrative interpretation of a statute, the dissent said:

> "* * * such contemporaneous official interpretation is a better guide when it is uncoerced. The predicament an official of the executive branch is placed in, when in a squeeze between law and appropriation limitations, is something we should regard with realism, if with sympathy too. To keep his program going, which he may well regard as his primary duty, he may adopt an interpretation of law which under other circumstances he would consider untenable.
>
> "* * * I would apply with hesitation the whole concept of a contemporaneous administrative interpretation when the interpretation at issue appears to have been necessary for budgetary reasons or might have been supposed to be so necessary." App. A, p. 26a.

REASONS FOR GRANTING THE WRIT

I.

This case raises questions of general importance respecting the appropriations powers and practices of the Executive and Legislative Branches of the Federal Government. Involved here is the legal dilemma which confronts an Executive Department when it must meet certain obligations specified by the Congress but

is not given adequate funds to do so. Even though the Executive Department in its own councils recognizes the obligation, it may see no legal alternative but officially to oppose it. As the dissenting opinion below noted: "The exigencies of Government as it is practiced force the bureaucrat into successions of extravagance and meanness, and he must do many a thing his heart is not in." App. A, p. 27a.

In this case, DoD's refusal to compensate overseas teachers in accordance with the express directive of Congress that they be paid compensation "in relation to the rates of basic compensation for similar positions in the United States" is sought to be justified—and has actually received judicial approval below—on the ground that DoD could adjust its response to the substantive directive of Congress according to subsequent appropriation acts; and on the further ground that those subsequent appropriation acts, which in nowise clearly or expressly gave authority to pay salaries *out* of relation to similar salaries in the United States, somehow could and did bestow such power indirectly. The questions arising from these circumstances are of obviously major importance in the administration of the affairs of the Federal Government and warrant the attention of this Court.

The general practice of Congress is to consider, debate and determine substantive policies upon the reports and recommendations of the Committees having jurisdiction over substantive policy, not in response to the reports and recommendations of the Appropriations Committees. Theoretically at least, the function of the Appropriations Committees is to determine the amount of money required to implement the policies which have been previously established. It cannot be

assumed that Congress is fully aware of the facts or the implications each time an Appropriations Committee minimizes or reduces the funds necessary to carry out substantive programs enacted by the Congress.

The dissent below took note of these considerations: "We are not always obliged to suppose a Congress knows what a committee has been told, especially when, as here, the committee is not the one that reported the statute to be interpreted. When the Commitees on Civil Service of the House and Senate learned of the interpretation here involved, they repudiated it emphatically." (App. A, p. 25a.) On the other hand, the majority opinion in the Court below imparted to appropriation legislation a purpose and effect to vary basic substantive law.

This case thus presents fundamental and delicate issues vital to the Federal process. They are issues of the highest importance, meriting consideration by this Court.

II.

This case presents the claims of 2,974 petitioners who were or are overseas teachers paid less than the amount mandated by the "in relation to" standard during the 1959-1966 period. Furthermore, there is a class action now pending in the District Court for the Eastern District of Virginia, *Chambers, et al.* v. *United States,* Civil Action No. 4106, involving claims of overseas teachers for compensation in accordance with the Act. Additional actions may be filed involving similar claims. In all, approximately 17,000 teachers, in addition to those involved herein, are in a position to assert such claims. In short, a decision on the merits in this

case will directly affect approximately 20,000 overseas teachers.

This case is the appropriate vehicle for resolving these claims. To await the outcome of other cases, besides entailing inevitable delay, invites substantial injustice. It would be unseemly and patently inequitable if this petition were to be denied, thereby foreclosing the instant petitioners, and the claims of others similarly situated were to be ultimately vindicated.

When a case involves the rights of as many individuals as are involved in this case, and particularly where those rights are asserted against the Government of the United States, the matter deserves the attention of this Court. *Cf. Honda* v. *Clark,* 386 U.S. 484 (1967).

III.

The decision of the Court below is squarely in conflict with the applicable decisions of this Court. This precise issue was presented in *United States* v. *Langston,* 118 U.S. 389 (1886). That case involved a conflict between a statute which provided that the Ambassador to Haiti would be paid a salary of $7,500.00, and a series of appropriation acts which had appropriated only $5,000.00 for his salary. This Court concluded that he was entitled to the full $7,500.00, holding that "a statute fixing the annual salary of a public officer at a named sum, without limitation as to time, should not be deemed abrogated or suspended by subsequent enactments which merely appropriated a less amount for the services of that officer for particular fiscal years, and which contained no words that expressly,

or by clear implication, modified or repealed the previous law." *Id.* at 394. See also *United States* v. *Vulte,* 233 U.S. 509 (1914).

The Court of Claims has previously not sought to dispute this principle. In *Lovett* v. *United States,* 104 Ct. Cl. 557, 582, 66 F. Supp. 142, 146 (1945), *aff'd on other grounds,* 328 U.S. 303 (1946), for example, the Court of Claims stated:

> "In a long line of cases it has been held that lapse of appropriation, failure of appropriation, exhaustion of appropriation, do not of themselves preclude recovery for compensation otherwise due."

More recently, in *New York Airways, Inc.* v. *United States,* — Ct. Cl. —, 369 F. 2d 743 (1966), the Court of Claims decided that the statutory power of the Civil Aeronautics Board to fix compensation for air carriers for transporting mail was *not* limited by the amounts appropriated annually by Congress for that purpose. The Court held: "If the purpose of the limiting language in the appropriation under consideration in the instant case was to suspend or amend [the substantive provision], it was not so expressed by statute. Any proof of congressional intention to the contrary in the legislative history must be clear and uncontradicted * * *." *Id.* at 750.

Contrastingly, in this case, there is no express langauge in the appropriation acts modifying the 1959 Act; indeed, there is no reference to teacher salaries in the appropriation acts. Nor is there any "clear and uncontradicted" legislative history supporting the court's interpretation of the appropriation acts.

To the contrary, the only relevant legislative history is that of the 1959 Act (see pp. 3-7, *supra*), which reveals the precisely contrary intention. A single theme dominates: a desire to provide terms and conditions of employment for overseas teachers which are comparable to those applicable to teachers in the United States. The most meticulous reading of the legislative materials—hearings, floor debates, and committee reports—fails to uncover even a hint of an intention to make teacher salaries dependent upon the annual appropriation or the per pupil limitation. Consequently, the result reached by the Court below rests upon a disregard or egregious misreading of the actual legislative history and it imputes to Congress the irrational —and discriminatory and hence, perhaps, unconstitutional—purpose of granting all federal employees, except these overseas teachers, substantial compensation increases during this period.

The decision in this case, therefore, does not alone present a great injustice to and discrimination against many thousands of overseas teachers. It presents a marked departure from long-established principles of law and an unacceptable reading of Congressional intention. If permitted to stand, it will provide a basis for the Government, in future cases, to argue successfully that inadequate appropriations justify a failure to honor its statutory or contractual obligations. This general question of the relationship between obligations and appropriations has arisen many times in the past, and is therefore likely to recur many times in the future, all the more frequently if a decision as significant and questionable as the decision below is permitted to stand without review and resolution of the issues involved by this Court.

CONCLUSION

For the reasons stated herein, this petition for a writ of certiorari should be granted.

Respectfully submitted,

ALAN Y. COLE
ISAAC N. GRONER
JERRY D. ANKER
COLE AND GRONER
1730 K Street N.W.
Washington, D. C.

Of Counsel:

EARL C. BERGER
LORBER, VOGEL & BERGER
16 Rue Chauveau
Neuilly sur Seine (92)
France